No. 12927

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANN SHERIDAN,

Plaintiff, Appellee and Cross-Appellant,

vs.

RKO RADIO PICTURES, INC., a Delaware corporation,

Defendant, Appellant and Cross-Appellee.

CROSS-APPELLANT'S REPLY BRIEF.

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CROSS-APPELLANT'S REPLY BRIEF.

Cross-appellant will be referred to as "we" or "Sheridan." Cross-appellee will be referred to as "RKO." Sheridan's opening brief will be referred to as "O.B." and RKO's reply brief as "R.B."

Certain preliminary remarks are required because of the erroneous statements made in RKO's brief to the effect that Sheridan's brief contains references outside the record. (R.B. 3.)

1. The first such assertion attacks the statement that "the lengthy contract was devoted almost entirely to protecting the interests of the employer, RKO."[1] The con-

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[1]RKO does not contend that this is an incorrect statement of fact. A gratuitous statement is made with reference to fraud, duress, etc., none of which has anything to do with any issue in this case.

tract referred to was introduced in evidence as Plaintiff's Exhibit 1 and is a part of the records and proceedings of this case. [R. 86.] Furthermore, under Rule 18 of this Court exhibits of material forming part of the evidence taken in the Court below are placed in the custody of the Clerk of this Court and are, therefore, at all times available for examination by the Court.

2. RKO makes the statement that no part of the contract is before this Court except the excerpts printed in the appendix to Sheridan's opening brief. (R.B. 3.) As pointed out above, under Rule 18 the contract as Plaintiff's Exhibit 1 is in the custody of this Court. Furthermore, counsel entered into a stipulation in order to avoid encumbering the record with material as to which there was no controversy. [R. 626.] Plaintiff's Exhibit 1 was one of the items mentioned in that stipulation and subsequently this Court on its own motion made an order that Plaintiff's Exhibit 1 need not be printed as part of the printed record. [R. 627.]

Finally, if RKO questioned the accuracy of the statement made with reference to the contract, it could have printed in an appendix to its brief that portion of the contract not printed in the appendix to Sheridan's brief. Significantly RKO failed to do this.

3. The next attack is leveled against the statement that the contract was drafted in its final form by the Legal Department of RKO. (R.B. 3.) Not only is the statement justified in fact, but it appears clearly in the record

as part of Sheridan's offer of proof. Therein the following language appears:

> "* * * that the contract dated April 29, 1949, was prepared by the legal department of defendant." [R. 107.]

Defendant, of course, is RKO.

> "* * * *it is a fact that the interlineations were made by the legal department of defendant in preparing the document which subsequently was executed by the plaintiff and defendant."* (Emphasis ours.) [R. 109.][2]

Finally, in preparing the document in its final form for submission to Sheridan it put its own caption at the head of the document "RKO Radio Pictures" which may be seen by an examination of that portion printed in Sheridan's brief. (O.B. Appendix 1.)

It is regretted that space had to be devoted to show that all of the statements objected to were true and correct.

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[2]The request by RKO (R. B. 4) for permission to go outside the record was unnecessary since all of the facts related by it and more appear in the record. [R. 107-109 and Pre-trial Stipulation III, Points 14, 15, 16 and 17, R. 45-46.]

[3]RKO'S SUMMARY OF THE ARGUMENT.

At the inception RKO illustrates the error which permeates its brief. After itemizing three points, RKO proceeds to interpret the contract by adding words which do not appear therein.

Thus, RKO states that its right to perform by payment of minimum compensation to Sheridan "was a valid *limitation of liability* available under all circumstances if the services of Sheridan were not used *in the picture* or the picture was not completed *with Sheridan appearing therein.*" (Emphasis ours.) (R.B. 5.) An examination of Paragraph 29 which is printed on page 8 of RKO's brief, shows that each of the phrases underlined in the preceding quotation does not appear therein.

Paragraph 29 says nothing whatever about limiting liability, but gives RKO the right to make alternate performance by payment of compensation less than would be required if full performance were made by Sheridan if either of the two contingencies therein provided for arose.

The first sentence nowhere includes in the first contingency the requirement that Sheridan's services be used "in the picture." On the contrary, the word "hereunder" is used and the word "hereunder" refers to use of Sheridan's services pursuant to the contract.

The second contingency relates to the contractual right given RKO not to complete the production of CARRIAGE ENTRANCE. It does not say "with Sheridan appearing therein."

The fundamental error made by RKO is in reading Paragraph 29 which has to do with performance as though it were a clause having to do with breach.

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[3]RKO did not in its brief reply in order to the argument made in Sheridan's brief. In this brief Sheridan will, wherever possible, refer to the headings used in RKO's brief.

I.
CONSTRUCTION OF THE CONTRACT.

A. The Relevant Provisions of the Contract.

In referring to Paragraph 12, RKO adds emphasis to the statement that Sheridan was not entitled to any compensation for the services described therein. (R.B. 7.) This added emphasis is misleading to say the least. An examination of Paragraph 12 clearly indicates that Sheridan is not entitled to compensation for such services only if such services take place "prior to the starting date of said term." (O.B. Appendix 7.) Such services after the starting date of the term are services for which Sheridan was to be compensated under Paragraph 6 of the contract. There should be no implication that the services described in Paragraph 12 were gratuitous except in so far as they took place in the week preceding July 6, 1949.

B. The Provisions Purporting to Limit Compensation.

In its heading RKO recognizes that Paragraph 29 is a clause affecting the amount of *compensation* payable to Sheridan under certain contingencies. In its argument RKO falls into the error mentioned above and treats the paragraph as "limiting damages." (R.B. 8.)

The language of the contract in the *Lorentz* case cited by both Sheridan and RKO (see *e. g.,* O. B. 18) illustrates the difference not only in language but in substance between Paragraph 29 and the clause in the *Lorentz* case. In the *Lorentz* contract the employee expressly gave a waiver and release to RKO from claims or causes of action based on failure of RKO to use the services of the employee or the results thereof or on the failure of RKO

to produce, etc., the picture. In the *Lorentz* contract the clause expressly related to breach or termination and limiting liability by reason thereof. No such language or concept appears in Paragraph 29 of the Sheridan contract.

The facts in the Sheridan case show (a) that RKO actually used the services of Sheridan under the contract; (b) that RKO actually completed the production of CARRIAGE ENTRANCE, and (c) that RKO did not pay or tender payment of minimum or any compensation to Sheridan as required under the first sentence of Paragraph 29.

RKO admits that the provisions of Paragraphs 20, 21 and 23 of the contract deal with rights of termination given to RKO. It, however, fails to meet the point made in Sheridan's opening brief (O.B. 14) that RKO knew of all of its needs with reference to its rights of termination. It covered these in the last numbered paragraphs. It did not in Paragraph 29 deal with termination and any construction of Paragraph 29 which would make it a termination paragraph does violence to the entire contract.

It is perfectly understandable that Sheridan might agree to a lesser payment if RKO made no use whatever of her services under the contract. It is likewise understandable that Sheridan might agree to a clause under which she would accept the lesser payment if RKO failed to complete the production of CARRIAGE ENTRANCE.

However, for a court to take the language to which Sheridan agreed and to expand it so as to include concepts radically different from those embraced in the language used does amount to working a forfeiture and perpetrating an injustice. The contract as construed by the District Court is not the contract which Sheridan signed.

[4]C. Was the Court Correct in Limiting RKO's Liability Under Paragraph 29?

In this portion of the argument RKO attempts to justify a construction of the contract beyond the language used in the first sentence of Paragraph 29. Paragraph 12 is cited by RKO as the basis for the statement that Sheridan was entitled to no compensation in addition to that provided in Paragraph 6 for services rendered in costume fittings, make-up, hair dressing, etc. (R.B. 14.) This is a completely mistaken reading of that paragraph.

The object of Paragraph 29 was to permit RKO to lessen its financial obligation to Sheridan if either of two contingencies arose. Emphasis must be given to the fact that it was in the complete discretion and control of RKO as to whether either of the contingencies would arise. These contingencies were:

1. Failure to use Sheridan's services "hereunder." The word "hereunder" referred only to the contract and cannot be read to mean "in the picture."
2. Failure to complete the production of CARRIAGE ENTRANCE.

RKO had the contractual right to abandon the production and if it did the first sentence of Paragraph 29 would have become available to RKO for the purpose of lessening its financial obligation to Sheridan. Nowhere in that first sentence does it appear that the phrase "to complete the production of CARRIAGE ENTRANCE" meant or was intended to mean anything else and certainly there is nothing in the first sentence or elsewhere in the con-

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[4]There is an arabic 1 but no arabic 2 in this portion of RKO's brief.

tract which permits the addition to that phrase of the language "with Sheridan."

At page 15 of its reply brief RKO makes the parenthetical observation that Sheridan was deprived of the opportunity to exercise and display her talent only because of her refusal to approve any of the persons proposed for the leading male role. Not only does this statement find no support in the record, but the absolute contrary is true as found by the jury in rendering a verdict for Sheridan.[5]

The quotation from the *Lorentz* case at the bottom of page 15 of the reply brief again illustrates the refusal of RKO to face the facts in the Sheridan case. That quotation refers to the fact that in the *Lorentz* case RKO actually discontinued the production. In the Sheridan case not only did RKO not abandon the production, but RKO proceeded to make the picture exactly as planned except for the fact that instead of giving Robert Mitchum

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[5]Before RKO would sign the contract it extracted from Sheridan an approval of Robert Young. [R. 43.] Sheridan approved Richard Conte. [R. 100.] Robert Mitchum was suggested by Sheridan. [R. 100.] John Lund was stated to be satisfactory to Sheridan. [R. 100.] Sheridan expressly approved Franchot Tone. [R. 102 and 114.] It was Mr. Howard Hughes, the managing director of RKO, who reversed his subordinates and refused to permit Franchot Tone to play the leading male role. [R. 115.] Sheridan again asked about John Lund, Richard Conte and Robert Mitchum and was informed that none of them was available. [R. 116.] Sheridan, on August 15, 1949, secured an audience with Howard Hughes, the managing director of RKO, and asked him directly for Robert Mitchum as the leading man in CARRIAGE ENTRANCE. Sheridan's request was again refused. [R. 127.] The name of Franchot Tone was again presented to the managing director of RKO, who again refused his consent. [R. 127.] On August 16, 1949, Sheridan discussed leading men with Sid Rogell, an executive of RKO and discussed the possibility of Charles Boyer playing the role. [R. 129, 130 and 131.]

to Sheridan as the leading man it supplied Robert Mitchum as the leading man in the picture with a different leading lady.

D. Did RKO Elect Not to Rely on the First Sentence of Paragraph 29?

At no time in Sheridan's argument was there any admission or implication that Paragraph 29 was a clause relating to termination of the contract. On the contrary, it was at all times asserted that Paragraph 29 was a clause which permitted alternate performance as distinguished from other paragraphs of the contract which related to termination.

RKO fails to answer the argument made by Sheridan in the opening brief, page 20 *et seq.,* that performance and breach are entirely inconsistent with each other and that RKO by its notice of August 17, 1949, committed a breach of the contract which deprived it thereafter of the right to perform under the first sentence of Paragraph 29.

Sheridan's promise to accept less than full compensation was conditioned on concurrent performance by RKO of its obligation to pay less than full compensation, or minimum compensation. Performance by RKO of its obligation was required on August 17, 1949, not under the compulsion of a verdict by a jury.

It should be observed that the foregoing argument is completely and specifically supported by the Restatement of the Law, Contracts, by the statutes of the State of California and by the case law on the subject. The statutes and case law are, of course, binding upon this Court.

Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817 (1938).

Section 344 of the Restatement of the Law, Contracts, Illustration 3, sets forth the law as follows:

> "3. In October, A contracts to break up certain prairie land for B by the following July 1, reserving the power to extinguish his duty to do so by paying $75.00 to B by December 1. This is an alternative contract, but it ceases to be so after December 1. If $75 has not been paid by that date, A's duty is to break up the land, and B's damages are measured by the value of that performance, not by $75 because A's failure to perform the earlier alternative is regarded as an election by him of the other one and his power to discharge his duty by paying the money has expired."

Section 1449 of the Civil Code of the State of California adopts the rule set forth in the Restatement as part of the statutory law of this state. This latter section reads as follows:

> "Notice Essential. If the party having the right of selection between alternative acts does not give notice of his selection to the other party within the time, if any, fixed by the obligation for that purpose, or, if none is so fixed, before the time at which the obligation ought to be performed, the right of selection passes to the other party."

Two decisions of the California courts express this same thought.

In *Jacobson Reimers Co. v. Tozai Co.,* 42 Cal. App. 178, 183 Pac. 466 (1919), a suit was brought against the defendant for failure to deliver turkeys under a contract which provided for the delivery of "from two hundred head up to twelve hundred between now and Thanksgiving." The defendants refused to deliver any turkeys what-

soever. The market price had increased over the contract price 14½ cents per pound. The lower court awarded damages for the plaintiff in the sum of $615.60 based upon the refusal to deliver 1200 turkeys. The defendants contended on appeal that its obligation was limited to the delivery of the minimum of 200 head of turkeys and that the judgment should be reduced to the sum of $77.60. The Court affirmed the judgment for the plaintiff in the full sum and stated:

> "Plainly, the statute gave defendants the right to deliver any number of turkeys from two hundred to twelve hundred 'between' the date of the obligation and November 29th. Defendants, admittedly, neither offered to nor did deliver any number of turkeys 'between now and Thanksgiving,' or at all, but, as the court found, refused to deliver any. In such case, by the terms of the statute, 'the right of selection passes to the other party.' It is not necessary to resort to textbooks or to the decisions of the courts. Sufficient to say, however, that our code states the rule accepted generally by writers upon the law of contracts and by the courts. We agree with the statement made by the learned trial court in the concluding paragraph of his written opinion:
>
> 'In this case there being no pretention that performance was even as much as attempted, it seems that under well-recognized principles of equity the defendant should not be permitted to limit his liability to the minimum delivery required by this agreement. To do so would allow the most flagrant abuse of such an agreement.' "

The same result was reached in *Whims v. Marco,* 137 Cal. App. 750, 31 P. 2d 475 (1934). The contract provided that the plaintiff should have a limited time to per-

fect his title and to secure the approval of the Corporation Commissioner. The balance of the purchase price was to be paid within 10 days after notice that this had been accomplished. Defendants had the right to relieve themselves of liability by paying the plaintiff the sum of $300 upon receipt of this notice. The plaintiff sued in the Superior Court for damages for breach of the contract to purchase the stock. The jurisdiction of the Superior Court was limited at the time to amounts in controversy of $2,000 or over. A judgment was rendered for the plaintiff. The defendant contended that the Superior Court did not have jurisdiction because the amount in controversy was but $300. In overruling this contention the District Court of Appeal stated:

> "The point arises out of the provision of the contract giving the defendants the right to relieve themselves from liability by paying plaintiff the sum of $300 upon receipt of notice of plaintiff's perfection of title. The complaint alleges that the defendants did not pay or offer to pay this sum and the trial court so found. As the contract called for payment 'forthwith,' it is evident that, whatever right of election the defendants may have had, they failed to exercise it and plaintiff was entitled to rest on his contract of sale. Section 1449, Civ. Code."

E. The Wrongful Discharge of Sheridan Subjected RKO to Damages Not Limited to $50,000.

The jury has found that RKO's termination of the contract was without cause and wrongful. There is nothing in the contract which justifies the statement by RKO (R.B. 18) that for termination without cause RKO was obligated to pay minimum compensation.

The rest of this portion of RKO's argument is answered elsewhere in this brief.

Sheridan cited from the memorandum of the Honorable District Judge at page 25 of the opening brief because that in the opinion of Sheridan was the correct position. Unfortunately, the Honorable District Judge subsequently changed his position to what Sheridan respectfully submits is an erroneous one.

II.

MINIMUM COMPENSATION DID NOT MEAN $50,000.00.

RKO's argument in its brief on this particular point is divided into two phases: (1) "minimum compensation" must mean $50,000.00 because "the only money which Sheridan would certainly receive would be the sum of $50,000.00 payable during the first week of photography." (R.B. 27.) (2) "minimum compensation" must mean $50,000.00 because "it would have been a very simple thing if the parties had $150,000.00 in mind, in paragraph 29, to have said flat compensation for this is the way the sum of $150,000.00 is designated throughout the contract." (R.B. 29.)

1. The first phase is predicated upon a false assumption. RKO attempts to differentiate the $50,000.00 payment from the $100,000.00 and from the percentage because the $50,000.00 is immutable, whereas the $100,000.00 and the percentage were dependent upon contingencies. An analysis of the contract will disclose that this is not the case for the following reasons:

(a) The $50,000.00 was payable "on the first regular weekly pay day after the principal photography of 'Carriage Entrance' has commenced but in no event later

than the seventh day after such photography has commenced." (O.B. Appendix 3.) This language introduced a contingency, to-wit, this $50,000.00 payment presupposed that photography of "Carriage Entrance" had commenced. In this respect it is impossible to differentiate the first $50,000.00 of flat compensation, which under the terms of the contract is payable only after photography of "Carriage Entrance" has commenced, and the $100,000.00 of the flat compensation which is payable only after certain gross receipts have been received from the motion picture. Both payments are contingent. It is only a question of the extent of the contingency.

Under the language of the contract, *if photography of "Carriage Entrance" was never commenced, the $50,000.00 payment would never become payable.*[6] (Emphasis ours.)

(b) The $50,000.00 payment is not a minimum payment because under certain circumstances the minimum compensation payable to Sheridan even if RKO's argument be adopted would be in excess of $50,000.00. This contingency would occur if Sheridan's services were required for more than 15 weeks. Under paragraph 6 of the contract Sheridan would be entitled to $10,000.00 a week for the time the term continues beyond 15 weeks. RKO does not deny that under the language of the contract if Sheridan worked for 17 weeks on the picture and if the picture was then abandoned, Sheridan would be entitled

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[6]It should be noted that RKO's argument is based upon the literal language of the contract. Our argument in this portion of our brief, accordingly, is directed to an analysis of this literal language. The fact that we analyze the contract in this manner should not be deemed a waiver by Sheridan of any of Sheridan's rights under the line of cases of which *Wolf v. Marsh* (1880), 54 Cal. 228, cited on page 12 of O. B. is typical.

to receive $70,000.00. Accordingly, on its face, RKO's argument that "construing the contract from its four corners, it clearly means the sum of $50,000.00"[7] is false.

(c) The smallest amount of compensation that Sheridan might receive under the contract could be less than $50,000.00. RKO argues that the phrase "minimum compensation" must mean $50,000.00 because $50,000.00 was "the minimum compensation which Sheridan would receive were the services of Sheridan used and the production of the picture complete." (R.B. last line p. 27 and first two lines p. 28.) From this RKO argues that the phrase "minimum compensation" has a definite meaning and that "it clearly means the sum of $50,000.00." However, it is not true that if Miss Sheridan had appeared in the picture the least amount of money that she would have received would have been $50,000.00. Paragraph 22 of the contract (O.B. Appendix 11) specified that Sheridan would not be entitled to any compensation for any time during which the agreement was suspended. Paragraphs 20 and 21 set forth certain contingencies under which the contract could be suspended, such as act of God, illness of the artist or the refusal of Sheridan. These paragraphs also contain provisions for the prorating of Sheridan's compensation in the event that the above contingencies occurred and the picture was released containing Sheridan's likeness. Thus, under paragraph 22, if Sheridan was able to work for only 4 weeks because of illness but Sheridan appeared in the released version of the picture, her compensation would be prorated at the rate of $10,000.00 a week, so that she would receive $40,000.00, *not* $50,000.00.

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[7]This statement appears in the main heading of Point II on page 26 of R.B.

Similarly, if Sheridan had been able to render her services for only 3 weeks, she would have received $30,000.00, *not* $50,000.00.

The phrase "minimum compensation" as used in the contract cannot be tied in with the sum of $50,000.00 upon any theory that the $50,000.00 was a fixed sum which was certain to be paid or that it was the smallest sum to which the artist would be entitled. Under certain circumstances, the smallest sum to which Sheridan would be entitled would be less than $50,000.00, under other circumstances it would be more than $50,000.00, and furthermore, under the literal language of the contract even the sum of $50,000.00 was contingent upon photography commencing.

2. RKO's argument that if the draftsman had intended "minimum compensation" to be $150,000.00, he would have used the language "flat compensation," is equally susceptible of the conclusion that if the draftsman had intended "minimum compensation" to mean $50,000.00, he would have used "$50,000.00" in paragraph 29 instead of the phrase "minimum compensation."

We concede that the language of paragraph 29 is by no means a model of clarity. Undoubtedly, future paragraph 29s which are drawn by RKO will not use the same terminology. They will specify "flat compensation" when flat compensation is intended, and they will specify "$50,000.00" if, as and when $50,000.00 is intended.

However, because the draftsman could have clarified the ambiguity is no reason to argue that "minimum compensation" must mean $50,000.00. The same argument which RKO is using in its brief can be used against it. To paraphrase RKO's own language, "it would have been a very simple thing, if the parties had $50,000.00

in mind, in paragraph 29 to have said '$50,000.00.'" Not only is this a good argument, but it is submitted that it is a better argument than that urged by RKO. We ask the Court to place itself in the position of the draftsman of the contract. RKO desires a paragraph 29 which would provide for the payment of $50,000.00 if Miss Sheridan's services were not used in connection with the photoplay. Is it likely that the court, acting as a draftsman, would use any such phrase as "minimum compensation" to refer to $50,000.00? Would not the Court have specifically provided that RKO "shall be deemed to have fully performed all of its obligations to artist by paying artist $50,000.00"? The very fact that the phrase "minimum compensation" was used conclusively demonstrates that something must have been intended other than $50,000.00 because it is inconceivable that somebody who intended to pay $50,000.00 would not say so but instead would say that he is paying minimum compensation.

It should be noted that there is a reason for using the phrase "minimum compensation" in lieu of the phrase "flat compensation." "Flat compensation" is merely defined in the contract as the sum of $150,000.00. [Ex. 1, O.B. par. 6.] Under a number of circumstances the minimum compensation which would be payable to Sheridan in the event that the motion picture was abandoned would differ from the flat compensation. Thus, if Sheridan was employed in the picture for 20 weeks instead of 15 weeks and the picture was abandoned, Sheridan would not be entitled to flat compensation, *i. e.*, to $150,000.00. In such event she should be entitled to the flat compensation plus $50,000.00 for the additional 5 weeks' work. Similarly, if Sheridan was ill and the contract was terminated because of such illness, RKO would not be obligated to pay Sheridan the flat compensation specified.

Under such circumstances RKO would only be obligated to pay Sheridan the "minimum compensation" specified in Paragraph 22. The language in Paragraph 29 would be wrong if it said that RKO shall be deemed to have fully performed all of its obligations to Sheridan by paying Sheridan the flat compensation. It is submitted that the intention of the parties was to pay the flat compensation as the same might have been adjusted either upward[8] or downward[9] in accordance with the contract.

A. The Offer of Proof Was Proper.

In this portion of its brief RKO purports to abstract the material contained in the offer of proof. It does so erroneously.

The offer of proof was intended to and encompassed an offer of evidence as to all of the negotiations from the inception of the project up to and including the execution and delivery of the documents out of which this litigation arose. [R. 106-110.]

The cases cited in Sheridan's opening brief (O.B. 31) are not even mentioned, much less discussed.

RKO proceeds to make an argument about a point not raised in the opening brief, having to do with custom and usage. (R.B. 34.)

In the opening brief California Civil Code, Section 1645, was cited by Sheridan as authority for permitting evidence to show the meaning of technical words as understood by persons in the profession or business to which

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[8]Sheridan did not work more than 15 weeks, and, therefore, is not entitled to any overages on that account.

[9]Sheridan was not ill or lawfully suspended so that RKO would not be entitled to a reduction.

they relate. The technical words with reference to which the offer of proof was made were "minimum compensation." The two cases cited in RKO's reply brief (R.B. 34) have nothing whatever to do with the point raised by Sheridan.

The appeal of Sheridan should, it is respectfully submitted, prevail and the judgment, in so far as it awards Sheridan the sum of $50,000.00, with interest, should be affirmed and the cause should be remanded for further proceedings in the trial court on the issue of the liability of RKO to Sheridan in excess of the amount already awarded and in conformity with this Court's opinion and the decision it renders herein. Should this Court determine that the phrase "minimum compensation," without parol evidence, means and is equivalent to "flat compensation" or $150,000.00, an appropriate judgment might be entered without further proceedings in the trial court.

Respectfully submitted,

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